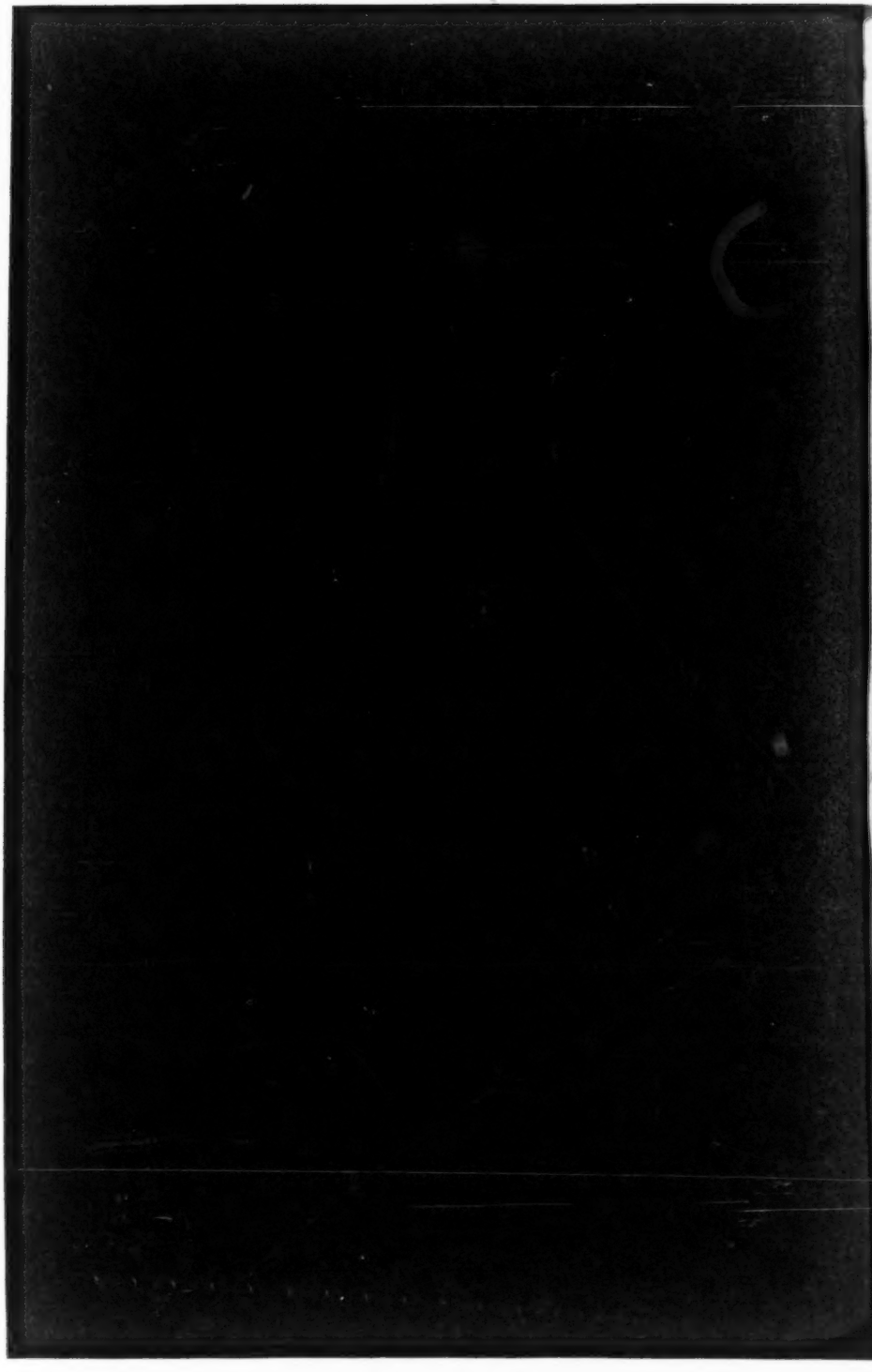


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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 397

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. A) is reported at 231 F. 2d 237. The findings of fact, conclusions of law, and order of the Board, including the Intermediate Report of the Trial Examiner (R. 43–67, 70–75), are reported at 113 N. L. R. B. 152.

JURISDICTION

The judgment of the court below was entered on March 20, 1956. Petitioner's application for rehearing was denied on April 11, 1956. On June 4, 1956,

by order of Mr. Justice Minton, the time for filing a petition for certiorari was extended to and including September 8, 1956. The petition was filed on September 8, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Sections 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether, in a hearing before a trial examiner, the General Counsel of the Board may enter into a stipulation of facts with the adverse parties in the proceeding without the consent of the charging party, subject to the right of the latter to introduce contrary or additional relevant evidence.

2. Whether, in the circumstances of this case, the trial examiner's denial of petitioner's request for a continuance of the hearing constituted an abuse of discretion.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151 *et seq.*) and the Board's Rules and Regulations are set forth in Appendix B to the petition.

STATEMENT

Upon charges filed by petitioner union (hereafter called the CIO), the General Counsel for the Board issued a complaint alleging that the Borg-Warner Corporation (hereafter called the Company) had, in violation of Section 8 (a) (2) of the Act, unlawfully assisted the International Union, United Automobile

Workers of America, AFL (hereafter called the AFL) and, in violation of Section 8 (a) (1), unlawfully interfered with, restrained and coerced the Company's employees in their right to self-organization. After the usual proceedings under Section 10 of the Act, the Board on July 13, 1956 issued a decision and order (R. 70–75) dismissing the complaint. At the hearing petitioner objected to several procedural rulings made by the Trial Examiner, which were thereafter affirmed by the Board and which give rise to the procedural questions urged in the petition for certiorari. The pertinent facts and rulings below relating to these issues may be summarized as follows:

1. THE PROCEEDINGS BEFORE THE BOARD

On March 11, 1954, petitioner filed its charge alleging that the Company unlawfully assisted the AFL, which was then the bargaining representative of the Company's employees at its old plant, by recognizing it as the bargaining agent for the employees to be hired by the Company in its newly established transmission department located in a new plant and by granting advance seniority and preferential hiring in the new department to members of the AFL (R. 48; 1). The AFL had, since 1951, represented the Company's production and maintenance employees in the old departments and had executed collective bargaining contracts, containing union-security provisions, in behalf of those employees (R. 47; 97). The underlying theory of the complaint issued by the General Counsel was that the employees in the new transmission department constituted a separate ap-

propriate unit, not represented by the AFL, and that the Company's extension of its latest (1954) union security contract to the prospective employees to be hired at the new plant constituted unlawful support to the AFL and interference with the employees' self-organizational rights (R. 48, 49–53; 3).

The hearing on the complaint was held on January 4 and 5, 1954 (R. 122; 77). Represented at the hearing were the Company (the respondent in the proceeding), the General Counsel, the AFL, and petitioner CIO, the charging party (R. 76–78). In an off-the-record discussion held on the first day of the hearing, the parties, including the representative of the General Counsel, counsel for the Company, and the attorneys for the AFL and the CIO, discussed the possibility of stipulating to certain facts (including facts as to the appropriate unit) in lieu of adducing the testimony of witnesses (R. 91). The representative of the General Counsel stated that if agreement could be reached on the proposed stipulations of fact, the General Counsel's case in chief would be complete (R. 29). Mr. Friedman, counsel for the CIO, indicated, however, possible disagreement with some of the stipulations offered by the General Counsel (R. 91).

At the hearing held the next morning (January 5), the General Counsel's representative formally proposed a series of stipulations to which counsel for the Company and the AFL subscribed *in toto* (R. 44; 94–105). Mr. Friedman agreed to all of the first, second and fourth, and to parts of the third and fifth stipulations, which dealt generally with the nature of the

Company's operations and the past contractual relations between the Company and the AFL (R. 44; 94–105, 109–111); he rejected in their entirety proposed stipulations Nos. 6 and 7, which dealt largely with the representative status of the AFL in the pre-existing unit, the physical characteristics of the new transmission department, and the job classifications of the Company employees (R. 102–105). Following receipt of the proposed stipulations in evidence the General Counsel rested his case.

Immediately thereafter, the trial examiner called upon the charging party to present whatever evidence it "proposes to offer" at the hearing (R. 106). Mr. Friedman, on behalf of petitioner, the charging party, asked counsel for the Company to produce Company Vice-President Andrix, for "questioning as a witness by the Charging Party" (R. 106–107). When Company counsel replied that he was not certain as to Andrix's availability, Mr. Friedman stated that he proposed to call him "as a witness for adverse examination," explaining, "I propose to examine Mr. Andrix briefly * * * with that, we will rest" (R. 45; 106–107).

Following the noon recess the hearing was reopened and the CIO introduced into the record certain documentary evidence (R. 46; 112–113). Thereafter, when it was discovered that Andrix was not available as a witness because he had left town earlier in the morning to attend a meeting of Company officials in Chicago, Mr. Friedman moved to recess the hearing until the following morning in order to give him "an opportunity to obtain and attempt to serve a sub-

poena on Mr. Andrix" (R. 45; 108, 113). Counsel for both the Company and the AFL opposed the motion for lack of diligence in failing to subpoena Andrix earlier (R. 45; 113–114). Counsel pointed out that Andrix could have been subpoenaed the day before or earlier in the morning when Andrix had been present at the hearing (R. 108, 114) at which time "counsel for the Charging Party knew * * * that he would be adverse to entering into a stipulation that the remaining counsel were contemplating entering into" (R. 114). In addition, counsel for the AFL explained that a postponement of the hearing would preclude his appearance in a Federal District Court with reference to an urgent matter (R. 114).

The trial examiner, after stating that in the circumstances he was "not disposed" to recess the hearing "simply to permit counsel for the first time to attempt service of a subpoena upon one of the officers of the Respondent Company," nevertheless recessed the hearing for approximately two hours to permit the CIO to serve a subpoena on Andrix (R. 45; 116–117).

When the hearing reconvened, Mr. Friedman reported that service of the subpoena had not been made on Andrix; that service of subpoenas had been attempted on two other supervisors but only one of them, Plant Superintendent Carter, was served, and that the latter had not appeared in response to the subpoena (R. 45; 117). Mr. Friedman then requested an adjournment of the hearing in order to seek enforcement in the courts of the subpoena di-

rected to Carter.[1] In support of this request, Mr. Friedman stated that the charging party desired "additional evidence * * * [to] strengthen the case presented by the General Counsel on behalf of the Government" (R. 123), and that the charging party "had no opportunity to cross examine and show bad faith, if bad faith there be, in the commission of certain acts on the part of company officials" or "to question the authenticity of documents or * * * of certain statistics which form part of the stipulation" (R. 129–130).

At no time did Mr. Friedman state that the stipulated facts were incorrect (R. 74). The trial examiner, on objection to the motion, after noting that "the CIO had made no effort to subpoena any of [the witnesses whose testimony it desired] in the 2-month period that elapsed between the issuance of the complaint and the opening of the hearing and * * * the additional fact that counsel conceded that he had not even talked with any of the individuals concerned so it was apparent he had no knowledge of what testimony they might give when called to the stand as adverse witnesses," denied the motion for a continuance (R. 45; 121–130). Thereafter Mr. Friedman, in support of his motion for a continuance, pro-

[1] Under Sec. 11 of the Act and Sec. 102.31 of the Board's Rules and Regulations proceedings to enforce subpoenas issued at the request of a private party are instituted in the District Courts by the General Counsel in the name of the Board on relation of the party. However, such proceeding cannot be instituted until the expiration of a 5-day period during which the subpoenaed person is entitled to file a petition to revoke.

posed to make an offer of proof concerning the evidence he intended "to introduce into the record through the calling of the witness [Carter] who has not appeared" in response to the subpoena (R. 133–134). The trial examiner rejected the offer, pointing out that, in view of counsel's admitted failure to interview or speak to the witness previously, "any statement as to what counsel might expect to prove * * * could not be any more than a fervent hope * * * as to what one might be able to prove" (R. 74, 46; 133–134).

Thereafter, following the close of the hearing the trial examiner granted Carter's motion to quash the subpoena (R. 18, 24). On January 7, petitioner appealed from this ruling to the Board, and asked the Board to order the hearing reopened (R. 25). This appeal was denied by the Board in an interlocutory order dated February 3, without prejudice to the charging party's right to renew its request when the Board considered the case on its merits (R. 120).

2. THE BOARD'S DECISION AND ORDER

In its final decision and order the Board affirmed the trial examiner's procedural rulings. The Board stated (R. 73–74):

> * * * the CIO * * * except[s] to the use of those portions of the stipulations in which it did not join * * *. We find no merit in this exception. The General Counsel, who is charged with primary responsibility for prosecuting the case, may properly enter appropriate stipulations with adverse parties concerning

> facts relevant to prosecution of the complaint which his investigation discloses, subject, of course, to the right of a charging party to introduce contrary evidence, or to adduce additional facts which, in its opinion, are material. In this case, the record indicates that the CIO was prepared to do neither. Indeed it did not even assert that the stipulations were inaccurate, but merely refused to join in certain portions which related to the AFL's representative status in the pre-existing unit and certain physical characteristics of the transmission department. * * * We further find that the Trial Examiner did not err in denying the CIO a second continuance in order to subpoena officials of the Respondent. As the Trial Examiner indicates, the CIO had made no effort to subpoena any of these witnesses in the 2-month period that elapsed between the issuance of the complaint and the hearing, and had not even talked with any of these individuals and consequently had no knowledge of what testimony they might give if called as adverse witnesses. In these circumstances, the CIO's offer of proof was patently inadequate and therefore properly rejected.

On the merits, the Board, overruling the trial examiner,[2] found, on the basis of the stipulation received in evidence, that the Company's new transmission department constituted an accretion to the existing bargaining unit rather than an independent unit and,

[2] The trial examiner, although overruling petitioner CIO's procedural objections, concluded that the stipulation established that the transmission department was a separate appropriate unit (R. 58). The Board reversed this conclusion.

therefore, that the extension of the 1954 union security agreement to the transmission employees was proper and lawful (R. 72–73). Accordingly, the Board dismissed the complaint.

3. THE COURT OF APPEALS DECISION

Upon the CIO's petition to review the Board's order, the court below affirmed the Board's procedural rulings and its decision on the merits (Pet. App. A, 17–27). In rejecting petitioner's contentions, the court below stated that although "the charging party does have some standing" in Board proceedings after issuance of a Board complaint, the Act "vests in the General Counsel of the Board authority in respect to the prosecution of complaints" and as "such prosecutor, he had power to enter into the stipulation received in evidence, without the concurrence of the CIO, the charging party" (Pet. App. A, 25–26). Pointing out that petitioner was afforded an opportunity to submit evidence "to contradict or explain the parts thereof in which it did not join," the court held that "the receipt in evidence of the stipulation did not deprive CIO of a fair hearing" (*ibid.*). The court below further held that the trial examiner did not abuse his discretion in denying petitioner's request for a continuance or in rejecting petitioner's offer of proof concerning the testimony which it proposed to adduce through Plant Superintendent Carter. The court stated (Pet. App. A, 26):

> In view of the fact * * * that there is no showing that [CIO] counsel had talked to Carter or in any other way knew what Carter would say if he testified, the attempt of said counsel to make an offer of what he would prove by Carter, if present as a witness, lacked substance and no doubt was considered by the examiner as a mere maneuver, which justified the refusal to permit the offer to be made.

ARGUMENT

1. The ruling of the court below that the General Counsel of the Board may properly enter into a stipulation of facts with adverse parties in an unfair labor practice proceeding, subject to the right of the charging party to introduce contrary or additional relevant evidence, is clearly correct. Section 3 (d) of the Act vests in the General Counsel "final authority * * * in respect of the prosecution of * * * complaints before the Board." According to Section 10 (b), only the person against whom the complaint runs "shall have the right to file an answer to the * * * complaint and to appear * * * and give testimony at the place and time fixed in the complaint." Under the Act anyone can file a charge and the statute itself does not confer upon the charging person the status of a party in a Board proceeding. The Act thus "makes no requirement for the presence in [the Board proceeding] of any private party other than the employer charged with an unfair labor practice." *Na-*

tional Licorice Co. v. *National Labor Relations Board,* 309 U. S. 350, 362–363.[3]

The Board's Rules and Regulations, however, accord to a charging party "the right to appear at such hearing * * * to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence * * *." Board's Rules and Regulations, Series 6, as amended (1951), Sec. 102.38. Consequently, a charging party participates in a hearing by leave of the Board in the exercise of its discretion, and not as of right.

Petitioner's contention here is basically (Pet. 11–14) that the participation which it enjoys under the Board's Rules includes the right to bar the General Counsel from entering into a stipulation of facts with the adverse party in an unfair labor practice proceeding, where the charging party does not concur in the stipulation, even though the latter is afforded, as here, an opportunity to submit contradictory or supplemental relevant evidence. This contention is clearly inconsistent with the statutory scheme which vests in the General Counsel final authority in the prosecution of complaints before the Board, and in effect would transfer that final authority, at least in some measure, to the charging party whose participation in the

[3] See also *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265–269; *Oughton* v. *National Labor Relations Board*, 118 F. 2d 486, 495–496 (C. A. 3), certiorari denied, 315 U. S. 797; *Stewart Die Casting Co.* v. *National Labor Relations Board*, 132 F. 2d 801, 803–804 (C. A. 7); *Semi-Steel Casting Co.* v. *National Labor Relations Board*, 160 F. 2d 388, 393 (C. A. 8), certiorari denied, 332 U. S. 758; *Kansas Milling Co.* v. *National Labor Relations Board*, 185 F. 2d 413, 415 (C. A. 10).

hearing is merely permissive. To be sure, the Board's Rules and Regulations confer upon such a party "the right" to examine and cross-examine witnesses. But that right and any requirements of due process are fully satisfied, we submit, where, as here, the charging party is afforded an opportunity to adduce evidence contradicting or supplementing a stipulation entered into between the General Counsel and the adverse party. "The Fifth Amendment guarantees no particular form of procedure." *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333, 351. It is enough that petitioner knew the claims of the opposing party as indicated in the stipulation and was afforded an opportunity to present such evidence as it may have had to supplement, qualify, or deny the stipulated facts. See *Morgan* v. *United States*, 304 U. S. 1, 18.

None of the cases cited by petitioner is in conflict with the decision below. In *Powhatan Mining Co.* v. *Ickes*, 118 F. 2d 105 (C. A. 6) the holding was merely that the complaining party, challenging a tabulation of certain statistical data prepared by the administrator, was entitled to secret information in the possession of the administrator which formed the basis of the tabulation. *Marine Engineers' Beneficial Association* v. *National Labor Relations Board*, 202 F. 2d 546, certiorari denied, 346 U. S. 819, turned upon the fact, not present here, that the charging party, which opposed the settlement of the unfair labor practice case entered into by the General Coun-

sel and the adverse party, was denied "a hearing on his objections thereto." And, finally, in *Daily Review Corp. v. National Labor Relations Board*, 192 F. 2d 269 (C. A. 2), also relied on by petitioner, the basis of decision was that the trial examiner had erroneously limited the scope of cross-examination by refusing to require a witness to answer certain questions.

2. Petitioner also presents (Pet. 2–3), but does not argue, the additional question whether assuming, as the court below held, that the trial examiner properly received into evidence the stipulation of facts, the trial examiner abused his discretion in refusing to grant petitioner's request for a continuance. Petitioner also objects to the examiner's rejection of its offer of proof concerning the testimony which it proposed to adduce through the subpoenaed witness if the hearing were continued. Since petitioner does not advert further to these contentions in its argument in support of the petition, it may suffice to say that the decision below is, for the reasons set forth therein (Pet. App., 22–24, 26), correct. In any event, petitioner's contentions in this regard present no substantial questions warranting review, since "It is elementary that the matter of continuance rests in the sound discretion of the trial court, and its action in that respect is not ordinarily reviewable." *Franklin* v. *South Carolina*, 218 U. S. 161, 168.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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